



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 171**

**[EPA-HQ-OPP-2021-0831; FRL-9134-02-OCSP]**

**RIN 2070-AL00**

### **Pesticides; Certification of Pesticide Applicators; Extension to Expiration Date of Certification Plans**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Interim final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is extending the expiration deadline of existing Federal, state, territory, and tribal certification plans. This deadline was established in 2017 when the EPA promulgated a final rule revising the Certification of Pesticide Applicators (CPA) regulations to improve the competency of certified applicators of restricted use pesticides (RUPs), increase protection for noncertified applicators using RUPs under the direct supervision of a certified applicator through enhanced pesticide safety training and standards for supervision of noncertified applicators, and establish a minimum age requirement for certified and noncertified applicators using RUPs under the direct supervision of a certified applicator.

Federal, state, territory, and tribal certifying authorities with existing certification plans were required to revise their existing certification plans to conform with the updated Federal standards for the certification of applicators of RUPs and submit their revisions for EPA review in March 2020. The existing plans are set to expire on March 4, 2022, unless the revised plans are approved by the Agency. EPA is extending the existing plans' expiration deadline to November 4, 2022. This will allow additional time for proposed certification plan modifications to continue being reviewed and approved by EPA without interruption to federal, state, territory, and tribal certification programs or to those who are certified to use RUPs under those programs. The extension also provides EPA with additional time to issue a proposed rule and seek public

comment on the need for extending the expiration date beyond November 4, 2022.

**DATES:** *Effective date:* This interim final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *Federal Register*].

*Comment due date:* Comments on the interim final rule must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *Federal Register*].

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2021-0831, using the Federal eRulemaking Portal at <https://www.regulations.gov>.

Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets/about-epa-dockets>.

Due to the public health concerns related to COVID-19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** Carolyn Schroeder, Pesticide Re-Evaluation Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 566-2376; email address: [schroeder.carolyn@epa.gov](mailto:schroeder.carolyn@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

#### *A. Does this action apply to me?*

You may be potentially affected by this action if you are a federal, state, territory, or tribal agency who administers a certification program for pesticides applicators. You may also be potentially affected by this action if you are: A registrant of RUP products; a person who applies

RUPs, including those under the direct supervision of a certified applicator; a person who relies upon the availability of RUPs; someone who hires a certified applicator to apply an RUP; a pesticide safety educator; or other person who provides pesticide safety training for pesticide applicator certification or recertification. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Agricultural Establishments (Crop Production) (NAICS code 111);
- Nursery and Tree Production (NAICS code 111421);
- Agricultural Pest Control and Pesticide Handling on Farms (NAICS code 115112);
- Crop Advisors (NAICS codes 115112, 541690, 541712);
- Agricultural (Animal) Pest Control (Livestock Spraying) (NAICS code 115210);
- Forestry Pest Control (NAICS code 115310);
- Wood Preservation Pest Control (NAICS code 321114);
- Pesticide Registrants (NAICS code 325320);
- Pesticide Dealers (NAICS codes 424690, 424910, 444220);
- Industrial, Institutional, Structural & Health Related Pest Control (NAICS code 561710);
- Ornamental & Turf, Rights-of-Way Pest Control (NAICS code 561730);
- Environmental Protection Program Administrators (NAICS code 924110); and
- Governmental Pest Control Programs (NAICS code 926140).

*B. What is the Agency's authority for taking this action?*

*1. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).*

This action is issued under the authority of FIFRA, 7 U.S.C. 136-136y, particularly sections 136a(d), 136i, and 136w.

*2. Administrative Procedure Act (APA).*

The APA provides that when an agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(3)(B).

EPA has determined that there is good cause for extending the expiration date for the existing certification plans without prior proposal and opportunity for comment for the following reasons:

- EPA's review and approval efforts, beginning in March 2020, were significantly hampered by the COVID-19 public health emergency, which created unforeseen circumstances that impacted EPA's ability to coordinate effectively with the state, territory, and tribal agencies and to provide early feedback to these certifying authorities during the two-year review and approval period. These impacts have also affected the state, territory, and tribal agencies' ability to respond to EPA's feedback and have significantly limited the amount of time these certifying authorities have to respond to such feedback. These issues resulted in EPA's review and approval process falling behind schedule. While slightly more than half of the 67 total plans have been reviewed by EPA to date, the Agency does not anticipate that all reviews will have been returned to the certifying authorities until February 2022. As a result, there is insufficient time for many of the certifying authorities to address all comments prior to March 4, 2022. See also the discussion in Unit II.B. and C.

- Even though EPA was aware that the review and approval process was falling behind schedule due to COVID-19 resource constraints at both the federal level and within the state, territory, and tribal agencies that develop, implement, and enforce these plans, EPA lacked the authority to develop changes to this regulatory deadline before October 1, 2021. Section 7(a)(2) of the Pesticide Registration Improvement Act of 2018 (PRIA 4) (Pub. L. 116-8; 133 Stat. 578), enacted on March 8, 2019, prohibited EPA from revising or developing revisions to the certification rule prior to October 1, 2021, thereby limiting EPA's ability to adjust the regulatory

deadline until now. This extension provides EPA and the certifying authorities an opportunity to complete the review and approval process that was hampered by the COVID-19 pandemic and for certifying authorities to begin implementation of the modified certification plans without a lapse in coverage, ensuring that the increased protections required by the 2017 rule (Ref. 1) are fully realized. See also the discussion in Unit II.D.

- Rulemaking requirements, which in this case also include FIFRA rulemaking requirements that delay the effective dates of FIFRA rules and prescribe external reviews of the draft rulemaking within prescribed time periods, make it impracticable to complete a standard notice and comment rulemaking between the October 1, 2021 end of the PRIA 4 prohibition and the March 4, 2022 expiration date. See also the discussion in Unit II.D. and V.

- The expiration of state, territory, tribal, and federal agency certification programs would have significant adverse impacts on the certifying authorities, the economy, public health, and the environment. Applicator certifications under programs with expired plans would no longer be valid, significantly impairing access to and use of RUPs in many parts of the country, which in turn could pose potential risks to agriculture, commerce, and public health. Although difficult to quantify, the economy would be impacted by the shutdown of existing certification programs, including the potential economic impacts from limited availability of RUPs, and related limitations on training providers, certified individuals, and the program infrastructure established by the certifying agencies. Additionally, the Agency's ability to carry out its function of ensuring that applicators have been adequately trained and assessed for competency to use RUP products and the certifying authorities' ability to implement their certification programs within their jurisdiction will be significantly impacted should existing plans expire before EPA approves the revised certification plans. See also the discussion in Unit I.E.

- The extension of the regulatory deadline directly impacts those state, territory, tribal, and federal certifying agencies whose revised certification plans may not be approved by the regulatory deadline of March 4, 2022. While providing these entities a formal opportunity for

comment on a proposed rule is impracticable for the reasons previously stated, certifying authorities have already expressed a need for more time to address EPA comments and have indicated their general support for the extension in communications with EPA. Given the urgent need for this rulemaking, EPA is issuing this rule as an interim final rule with post-promulgation public comment in order for the extension to be effective before the regulatory deadline of March 4, 2022.

In conclusion, for the reasons enumerated here, EPA is promulgating this interim final rule without a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(3)(B) because the Agency finds good cause that notice and public comment procedures are impracticable. In addition, EPA is also planning to issue a separate notice of proposed rulemaking (NPRM) in the near future to request comment on the potential need to further extend the regulatory deadline. EPA intends to address comments in response to this interim final rule and the NPRM concurrently and to publish a final rule.

*C. What action is the Agency taking?*

This interim final rule is revising the expiration date for existing certification plans at 40 CFR 171.5(c) from March 4, 2022, to November 4, 2022. While EPA anticipates that all plans will have been reviewed and returned to the certifying authorities for further revision by February 2022, this revision will allow for certifying authorities that need more time to respond to EPA comments and prepare approvable certification plans, and more time for EPA to work with the certifying authorities to assure that their proposed certification plan modifications meet current federal standards. Although significant progress has been made in the development of revised plans and EPA's subsequent reviews, COVID-19 resource constraints have impacted the time certifying authorities have had to respond to EPA's comments and Agency's ability to work with certifying authorities to assure that their plans are approvable by the March 2022 deadline. Further collaboration is still needed between EPA and the certifying authorities to finalize and approve plans. EPA intends to work expeditiously toward approving and supporting the

implementation of plans that meet the current federal standards during the extension and intends to provide periodic notifications to the public when those approvals have occurred. No other changes to the certification standards and requirements specified in 40 CFR part 171 are being made in this rulemaking.

In addition to this interim final rulemaking, EPA is planning to issue a separate notice of proposed rulemaking (NPRM) for public comment on the potential need to further extend the expiration date for existing plans beyond November 4, 2022. Any additional extension pursued by the Agency will be informed by both the progress on plan reviews and approvals made during this extension period and by the public comments on this interim final rule and the NPRM.

*D. Why is the Agency taking this action?*

EPA finds that the deadline extension is an urgent need and necessary to assure that certified applicators will continue to be authorized to use RUPs without interruption and to provide certifying authorities with additional time to review and respond to EPA comments on their plans. The extension will also provide additional time for EPA to work more closely with the certifying authorities to address any remaining feedback and work toward approving their revisions. This extension also provides the Agency an opportunity to propose a longer-term extension through standard notice and comment rulemaking procedures. Without the deadline extension, modified certification programs that are not approved by the regulatory deadline of March 4, 2022, will expire, and applicators formerly trained and certified under such plans will no longer be allowed to use RUPs.

*E. What are the Incremental Impacts of this Action?*

Incremental impacts of extending the regulatory deadline are generally positive because the extension provides certifying entities and EPA with more time to ensure that modified plans meeting the minimum federal requirements are in place, while failure to extend the regulatory deadline would likely have significant adverse impacts on the certifying authorities, the economy, public health, and the environment (see discussion in Unit I.B.2.).

EPA uses information from the 2017 certification rule (Ref. 1), which mandates the March 4, 2022 expiration of existing certification plans unless EPA approves revised certification plans, to assess the incremental economic impacts of this interim final rule which extends this deadline from March 4, 2022, to November 4, 2022. The impacts of the extension are that the implementation costs borne by the certifying authorities will be expended over an additional period of time and some of the costs to commercial and private applicators may be delayed. Some of the benefits of the rule (e.g., reduction in acute illnesses from pesticide poisoning) are foregone as the implementation of some plans may be delayed while EPA works with the certifying authorities toward approval of their revised certification plans.

#### *1. Cost to Certifying Authorities.*

The 2017 rule provided a compliance period for certifying authorities to develop, obtain approval, and implement any new procedures, regulations, or statutes to meet the new federal standards. The 2017 rule further provided that existing plans could remain in effect after March 4, 2022, only to the extent specified in EPA's approval of a modified certification plan; EPA did not explicitly set a date for full implementation of the new programs. Certifying authorities can begin implementing their revisions to their programs when they are approved by EPA; portions of revised certification programs may be implemented in advance of plan approvals when in compliance with the 2017 rule requirements. All certifying authorities submitted their draft revised certification plans to EPA by the March 2020 deadline and the draft plans are presently undergoing review at EPA. Shortly after the March 2020 deadline, the COVID-19 public health emergency disrupted the normal progress of the EPA's review and approval of the draft plans. EPA and certifying authorities could not put the amount of effort into this part of the rule implementation that was originally anticipated, as they had to divert their resources to addressing pandemic-related issues. Thus, only part of the cost to certifying authorities estimated in the 2017 rule has presently been spent and some of the cost will be expended during the additional extension period. Therefore, this interim final rule is not expected to significantly change the



costs to certifying authorities estimated in the 2017 Economic Analysis (EA) (Ref. 2).

### *2. Cost to certified applicators.*

The other sectors affected by the 2017 rule (e.g., commercial and private applicators) are not incurring any costs until revised certification plans take effect. Once the revised plans take effect, the 2017 EA estimated that commercial applicators and private applicators would incur annualized costs of \$16.2 million and \$8.6 million, respectively, to meet the new certification standards. Some of these costs could be delayed as revised programs are approved and implemented over a longer period of time.

### *3. Potentially delayed benefits of the 2017 rule.*

The delay in the approval of revised certification plans may also delay some benefits that would have otherwise accrued if certification plans were approved and implemented by the deadline established in the 2017 rule, as assessed in the 2017 EA. In 2017, EPA estimated that implementing the new federal certification requirements would reduce acute illness caused by exposure to RUPs, based on an analysis of pesticide incidents assuming that about 20% of poisonings are reported (a plausible estimate based on the available literature regarding occupational injuries or chemical poisoning incidents). Incidents may result in harms to applicators, persons in the vicinity, and the environment. Reported incidents most commonly cite exposure to the applicator or farmworkers in adjacent areas. Based on avoided medical costs and lost wages, the annualized benefits of the rule were estimated to be between \$51.1 and \$94.4 million. In addition, EPA expected that improved training would also reduce chronic illness among applicators from repeated RUP exposure and would benefit the public from better protections from RUP exposure when occupying treated buildings or outdoor spaces, consuming treated food products, and reducing the impact on non-target plants and animals. To the extent that this rule delays implementation of the 2017 rule, it will delay accrual of some of those benefits.

Not all the benefits of certification program revisions will be delayed, however, since

some programs have been or will be able to start implementing changes sooner. Certifying authorities can begin implementing their revisions to their programs as soon as they are approved by EPA, some of which are anticipated to be approved in early 2022. In some jurisdictions, portions of revised certification programs are presently being implemented and in compliance with or exceeding the 2017 rule requirements, such as imposing minimum age requirements and updating manuals and exam administration procedures, so some benefits are already being realized in advance of full plan approvals. Additionally, some certifying authorities were forced to make changes to their existing certification programs to accommodate COVID-19-related protocols. Any changes that were made to existing plans to make these accommodations were required to be consistent with the new requirements and standards established in the 2017 rule.

Without the extension, however, the benefits of the 2017 rule would not be fully realized. The impact of plans expiring absent EPA's approval of modified plans has far-reaching implications across many business sectors, including but not limited to the agricultural sector, importation and exportation business, and structural pest control (e.g., termite control), and could potentially impact all communities and populations throughout the U.S. in various ways as discussed in Unit I.E.4. In addition to the potential delay of benefits that would result from this extension, EPA and certifying authorities have already invested significant resources in the preparation and review of plan modifications that would fully implement the 2017 rule. It is EPA's considered judgement that the sunk cost of these investments, taken together with the significant costs of not extending the deadline as discussed in Unit I.E.4., outweigh the delayed benefits. EPA will continue to work expeditiously with certifying authorities to review and approve plans on a rolling basis. EPA's ongoing collaboration with the certifying authorities, which was significantly impacted by the COVID-19 pandemic, will result in modified plans that are protective of the environment and human health, including the health of certified pesticide applicators and those under their direct supervision, and will ensure that certified applicators are trained to prevent bystander and worker exposures as contemplated in the 2017 rule.

#### *4. Costs of not extending the deadline.*

If the regulatory deadline is not extended, it is likely that EPA will be unable to approve many of the state, territory, tribal, and other federal agency certification programs, resulting in termination of these programs. EPA would have to take responsibility for administering certification programs for much of the country. A gap in coverage will likely exist between when certification programs expire and when EPA can fully implement EPA-administered certification programs, resulting in RUPs being unavailable for use in many places during the 2022 growing season and potentially through the end of 2022 or longer. It is also unlikely that EPA's certification programs would offer the same availability and convenience as those offered by state, territorial, and tribal certifying authorities, so it is likely that some applicators would face higher costs or be unable to obtain certification to apply RUPs. Additionally, once the EPA-administered certification plans are in place, they may in some cases be less protective than state plans would be, as many state plans include requirements that are more protective than the EPA requirements and these benefits will be lost if the deadline is not extended and EPA takes over many of the country's certification programs.

Additionally, EPA would be forced to expend time and resources in establishing the infrastructure to administer these certification programs, which would further delay coordination with certifying authorities whose plans were either approved and would be in the process of being implemented, or are awaiting approval. This is likely to cause significant disruption for agricultural, commercial, and governmental users of RUPs, and could have consequences for pest control in a broad variety of areas, including but not limited to the control of public health pests (e.g., mosquito control programs), pests that impact agriculture and livestock operations, structural pests (e.g., termites), pests that threaten state and national forests, and pests in containerized cargo. Applicators could lose work and income. Further, the expiration of certification plans could lead to confusion and potential enforcement issues when certifications that were formerly valid suddenly expire. It is also unlikely that EPA's certification programs

could offer the depth of specialization found in many state, territorial and tribal certifying programs, which may be tailored to the particular pest control and human health needs commonly found in these localities. Thus, applicators certified under EPA programs would only be assessed for competency at the minimum federal standards and may not receive the specialized training that state, territorial, and tribal certifying authorities often provide. In addition, many states require professional applicators to be trained and licensed to apply general use pesticides and it is unclear to what extent states would be able to support those programs if they were to lose authority to certify RUP applicators.

#### *F. Request for Comments.*

The Agency invites certifying authorities, certified applicators, and the public to provide their views on the extension of the expiration date to November 4, 2022. Additionally, in advance of the planned NPRM seeking further extension of this deadline, commenters are encouraged to provide feedback on the need for, or concerns over, further extending the expiration date of existing plans and the appropriate length of a longer extension if warranted. Comments on this interim final rule will also be considered in the development of that rulemaking.

#### *G. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through <https://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments,

see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

## **II. Background**

### *A. January 2017 Final Rule*

In January 2017, EPA finalized a rule that revised the Certification of Pesticide Applicators regulations at 40 CFR part 171 (certification or CPA rule) (Ref. 1). The certification rule sets standards of competency for persons who use RUPs and establishes a framework for certifying authorities to administer pesticide applicator certification programs. One of the stated purposes of the 2017 rule is to ensure that persons using RUPs are competent to use these products without causing unreasonable adverse effects to themselves, the public, or the environment.

In updating the CPA regulations, EPA revised the regulation to enhance the following: commercial and private applicator competency standards, exam and training security standards, standards for noncertified applicators working under the direct supervision of a certified applicator, tribal applicator certifications, and the requirements for submission, approval, and maintenance of state, tribal, territory, federal agency, and EPA-administered certification plans. The final rule also revised the regulation by adding categories of certification for commercial and private applicators, adding a recertification interval and criteria for recertification programs administered by certifying authorities, and establishing a minimum age for both certified applicators and noncertified applicators who use RUPs under direct supervision of certified applicators.

For federal agency plans, the final rule deleted the section on Government Agency Plans (GAP) in the old 40 CFR 171 and codified the existing policy on review and approval of federal agency certification plans prior to the 2017 rule. For tribal agency plans, the final rule offered tribal governments three options not previously provided for certifying applicators in Indian country. A tribe may choose to allow persons holding currently valid certifications issued under one or more specified state, tribal, or federal agency certification plans to apply RUPs within the

tribe's Indian country, develop its own certification plan for certifying private and commercial applicators, or take no action, in which case EPA may, in consultation with the tribe(s) affected, implement an EPA-administered certification plan within the tribe's Indian country. EPA currently administers (Ref. 3), and has proposed updates to (Ref. 4), a federal certification program covering Indian country not otherwise covered by an individual tribal certification plan.

Under the 2017 rule, existing certification plans approved by EPA before the effective date of the rule (March 6, 2017) would remain in effect until March 4, 2020. If a certifying authority submitted an amended certification plan to EPA for approval by the March 2020 deadline, the existing certification plan would continue to remain in effect until EPA has reviewed and responded to the amended certification plan, but not beyond March 4, 2022, unless EPA authorizes further extension in its approval of an amended certification plan. EPA will specify in its approval of a plan how long the existing plan may remain in effect while the certifying authority prepares and completes implementation of its amended certification plan. EPA will base each certifying authority's implementation period on the circumstances of that jurisdiction.

#### *B. Attempted Changes to the 2017 Rule's Effective Date and Efforts to Meet the Regulatory Deadlines*

In a series of *Federal Register* notices published in 2017 (Refs. 5, 6, and 7), EPA attempted to delay the effective date of the 2017 rule until May 22, 2018 in order to reconsider the merits of the rule. Litigation over the effective date resulted in the delay rules being vacated and the original effective date of March 4, 2017, being restored (Ref. 8). While efforts to begin outreach and implementation of the certification rule continued during this process, such as EPA's course for regulatory agencies in April 2017 (Ref. 9), some of the Agency's efforts to develop and provide guidance and support materials on the Agency's expectations regarding the revised certification plans slowed down, and some certifying authorities delayed efforts to update their certification plans under the expectation that the three-year window to revise and submit

modified certification plans was not going to start until May 22, 2018, if at all. The uncertainty about whether the rule was effective and its potential fate upon reconsideration caused EPA and the certifying authorities to lose some of the time the rule had allotted for collaboration in advance of the March 2020 submission deadline.

Despite some of the early delays, EPA and the certifying authorities were productive during the remaining two years, with significant collaborative efforts on an individual level between the certifying authorities and EPA Regional Offices, as well as in-person group settings with the certifying authorities and EPA staff (Ref. 10). These efforts resulted in all certifying authorities submitting their draft certification plan revisions to EPA by the March 2020 deadline established in regulation. As a result, all plans that were approved by EPA prior to March 6, 2017, continue to remain in effect while EPA reviews and works with the certifying authorities toward approval of their certification plans. These existing certifications plans are set to expire on March 4, 2022, unless the modified plans are approved by EPA and the approved plan specifies the time needed to fully implement the revisions identified.

### *C. Impact of the COVID-19 Public Health Emergency on EPA's Review and Approval Process*

When EPA selected a two-year period from March 2020 to March 2022 for evaluating and approving modified plans in the 2017 rule, the Agency had anticipated that significant engagement would continue with the certifying authorities during the review period to ensure that their draft certification plans meet or exceed the minimum requirements. EPA also expected that the proposed plans would need further modification before they could be approved by EPA. Additionally, EPA expected in 2017 that a number of plans would have been submitted earlier than the regulatory deadline for submission, thereby resulting in the reviews being spread out over a longer period of time instead of the two-review review period. However, due in part to the loss of early collaboration time and delays as described in Unit II.B., most of the plans were submitted on or shortly before the regulatory deadline, and some of the work that would have been done by EPA and certifying authorities before plan submission was shifted into EPA's

review period, thereby increasing the level of effort for both EPA and certifying authorities during this two-year period. Despite these issues, EPA anticipated and planned for much of the additional work after submission to be completed by May 2021, with final review and approvals to follow shortly thereafter.

However, while EPA was prepared for this influx of plans, shortly after the March 2020 submission deadline, the COVID-19 public health emergency arose. This significantly impacted the certifying authorities' resources and ability to address EPA comments in a timely manner, as resources shifted to address pressing public health needs related to COVID-19. Additionally, EPA necessarily redirected some of the staff and resources dedicated to certification plan reviews to address emerging COVID-19 related issues. Examples include providing support to the existing certification programs to adapt to the COVID-19 crisis (Ref. 11), as well as addressing a number of COVID-19-related issues impacting farmworker pesticide safety under the Agricultural Worker Protection Standard (WPS) at 40 CFR 170 such as health concerns around in-person training and reduced availability of respiratory protection equipment (Ref. 12, 13, 14, and 15). EPA staff involved in plan reviews also spent considerable time early in the pandemic to help respond to public inquiries (both in Spanish and English) regarding COVID-19 and pesticide products that may be effective at killing the virus, among other support efforts within the Agency at the time.

COVID-19 also drew certifying authorities' resources away from pursuing compliance with the 2017 rule in various ways, such as the need to accommodate social distancing in their applicator training and testing procedures. To support these efforts, EPA staff frequently met with state and regional staff and issued guidance (Ref. 11) to ensure that these program changes were consistent with the new federal requirements while meeting their needs during the pandemic. This resulted in delayed reviews and EPA feedback on the new certification plans. While EPA anticipates that all plans will have been reviewed and returned to the certifying authorities with comments by February 2022, the early impacts of COVID-19 on available



resources and plan reviews have significantly limited the amount of time that many certifying authorities have had to address EPA's comments prior to the March 2022 deadline.

#### *D. PRIA 4 Restriction*

In 2017, EPA published a document in the *Federal Register* stating that the Agency had initiated rulemaking to reconsider the minimum age requirements under 40 CFR 171 (Ref. 16). As indicated in Unit I.B.2., negotiations around the PRIA 4 reauthorization resulted in the mandate requiring EPA to carry out and implement the 2017 rule as finalized and prohibited the Agency from revising or developing revisions to the CPA regulations prior to October 1, 2021, thereby halting the reconsideration of the minimum age requirements and any other potential changes to the certification rule until that date. In accordance with PRIA 4, EPA has been working with the certifying authorities to revise and complete the review and approval process of their certification plans by the deadlines established in 40 CFR 171.5.

However, the COVID-19 public health emergency has negatively impacted both the Agency's ability to review and approve plans in a timely manner and has impacted the certifying authorities' ability to respond to Agency comments quickly and effectively as discussed in Unit II.C. While EPA has been aware that the review and approval of plans was behind schedule for the reasons previously described, EPA was prohibited from undertaking any effort to amend the certification rule to extend the expiration date for the existing plans until October 1, 2021, when the PRIA 4 prohibition against revising or developing revisions expired.

FIFRA imposes additional requirements that add to the complexity of rulemaking. One requirement, 7 USC 136w(a)(2)(A) and (B), requires up to 60 days of review by the Secretary of Agriculture for proposed rules and 30 days for final rules (see Unit V). Another requirement, 7 USC 136w(a)(4), provides that a rule does not become effective until 60 days after it has been promulgated. When FIFRA rulemaking requirements and the PRIA 4 prohibition are considered together, EPA did not have sufficient time to comply with conventional notice and comment rulemaking procedures and applicable executive orders.

### **III. Provisions of this Interim Final Rule**

#### *A. Need for Extending the Existing Plans' Expiration Date*

An extension of the expiration date for existing certification plans is needed to ensure that federal, state, territory, and tribal agencies have sufficient time to revise their certification plans in response to EPA's feedback on their draft certification plans. Absent an extension of this deadline, it is likely that a significant number of state, territory, tribal, and other federal agency certification programs will terminate, causing severe disruption for agricultural, commercial, and governmental users of RUPs. Failure to extend the regulatory deadline, and the resulting expiration of many certification programs, would significantly limit access to certification, thereby limiting access to RUPs that are necessary for various industries that rely upon pest control.

If EPA is unable to act expeditiously to extend the regulatory deadline, many existing certification plans that remain in effect pending EPA's review of submitted certification plan modifications will expire on March 4, 2022, in which case 7 U.S.C. 136i(a) requires that EPA provide RUP applicator certification programs in states (including territories) where a state certification plan is not approved. If EPA were to take on the burden of administering certification programs for much of the country, it would draw resources away from other important Agency priorities, including implementation of certification plans that are approved before the March 2022 deadline. In addition, it would take significant time and resources to set up the infrastructure for such federal certification programs and to train, test, and certify applicators, which would likely result in RUP use being curtailed in affected states. It is unlikely that EPA would be able to establish these federal certification programs before the start of the 2022 growing season, which would have potentially devastating impacts on the agricultural sector in many parts of the country. Moreover, once EPA-administered state certification programs are established, it is unlikely that they would operate at the same capacity as existing state programs, but rather, would provide fewer and less localized opportunities for applicators to

satisfy certification requirements. As a result, significant adverse effects are expected on the pest control industry if current plans expire, as existing certifications will no longer be valid and will need to be replaced with federal certifications, likely creating economic and public health ramifications in a wide range of sectors such as agricultural commodity production, public health pest control, and industrial, institutional, and structural pest control. RUP access in this scenario would be minimal for most, if not all, of the 2022 growing season, and significant disruptions could extend even further.

#### *B. New Deadline for Certification Plan Approvals*

Under this interim final rule, the deadline for amended certification plans to be approved without interruption of the existing certification plans provided in 40 CFR 171.5(c) is being changed from March 4, 2022, to November 4, 2022. This additional time is necessary to assure that all the certifying authorities have enough time to present approvable certification plans, and for EPA to work more closely with the state, territory, and tribal agencies on necessary modifications, and ultimately approve their certification plans. As some certifying authorities are close to completing their revisions and receiving EPA approval on their plans, EPA anticipates that some certification plan approvals will begin in early 2022 and will continue through the revised November 4, 2022 deadline. EPA anticipates that notice of certification plan approvals will be periodically provided to the public in batched notices in the *Federal Register* and on EPA's website as they are approved.

The extension in this interim final rule will also provide EPA with additional time to issue a separate NPRM seeking further extension of the deadline, providing stakeholders an opportunity to submit comments on the need for an additional extension to the expiration date for existing plans, and to include in their comments specific information detailing the necessity for or concerns over such an extension. EPA will be seeking this additional comment, because EPA did not have sufficient time to propose an extension prior to the regulatory deadline and is interested in seeking additional information to determine an appropriate length of time for such

an extension. During this upcoming comment period in the following proposed rule, EPA expects that certifying authorities and other interested stakeholders will be able to provide more information on the efforts, issues, and concerns within each certifying authorities' jurisdiction and the potential impacts of delayed certification plans should plans require additional review time beyond November 4, 2022.

#### **IV. References**

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under FOR FURTHER INFORMATION CONTACT.

1. EPA. Pesticides; Certification of Pesticide Applicators; Final Rule. *Federal Register*. 82 FR 952, January 4, 2017 (FRL-9956-70).

2. EPA. Economic Analysis of the Final Amendments to 40 CFR Part 171: Certification of Pesticide Applicators [RIN 2070-AJ20]. December 6, 2016. Docket ID No. EPA-HQ-OPP-2011-0183-0807.

3. EPA. Final EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides Within Indian Country; Notice of Implementation. Notice. *Federal Register*. 79 FR 7185, February 6, 2014 (FRL-9904-18).

4. EPA. EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides Within Indian Country; Proposed Revisions; Notice of Availability and Request for Comment. *Federal Register*. 85 FR 12244, March 2, 2020 (FRL-10005-59).

5. EPA. Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017. *Federal Register*. 82 FR 8499, January 26, 2017 (FRL-9958-87-OP).

6. EPA. Further Delay of Effective Dates for Five Final Regulations Published by Environmental Protection Agency between December 12, 2016 and January 17, 2017. *Federal Register*. 82 FR 14324, March 20, 2017 (FRL-9960-28-OP).

7. EPA. Pesticides: Certification of Pesticide Applicators; Delay of Effective Date. *Federal Register*. June 2, 2017 (82 FR 25529) (FRL-9963-34).

8. *Pineros y Campesinos Unidos del Noroeste, et al., v. Pruitt, et al.*, Case No. 17-CV-03434 (N.D. Cal. filed June 4, 2017); 293 F. Supp. 3d 1062 (N.D. Cal. 2018).

9. EPA. 2017 Pesticide Regulatory Education Programs. Course: Pesticide Applicator Certification. Baltimore, MD. April 4-6, 2017.

10. EPA. 2019 Pesticide Regulatory Education Program Applicator Certification Rule PREP. Crystal City, VA. April 29 – May 2, 2019.

11. EPA. Memorandum: Guidance regarding the Certification of Pesticide Applicators during the COVID19 Public Health Emergency. July 27, 2020.

12. EPA. Memorandum: Guidance on Satisfying the Annual Pesticide Safety Training Requirement under the Agricultural Worker Protection Standard during the COVID-19 Emergency. June 18, 2020.

13. EPA. Memorandum: Statement Regarding Respiratory Protection Shortages and Reduced Availability of Respirator Fit Testing Related to Pesticide Uses Covered by the Agricultural Worker Protection Standard during the COVID-19 Public Health Emergency. June 1, 2020.

14. EPA. Memorandum: Amendment to the June 1, 2020, Statement Regarding Respiratory Protection Shortages and Reduced Availability of Respirator Fit Testing Related to Pesticide Uses Covered by the Agricultural Worker Protection Standard during the COVID-19 Public Health Emergency. May 6, 2021.

15. EPA. Memorandum: Termination of the June 1, 2020 Statement/May 6, 2021 Amendment Regarding Respiratory Protection Shortages and Reduced Availability of Respirator

Fit Testing Related to Pesticide Uses Covered by the Agricultural Worker Protection Standard during the COVID-19 Public Health Emergency. August 10, 2021.

16. EPA. Pesticides; Certification of Pesticide Applicators Rule; Reconsideration of the Minimum Age Requirements. *Federal Register*. December 19, 2017 (82 FR 60195) (FRL-9972-11).

## **V. FIFRA Review Requirements**

In accordance with FIFRA section 25(a), EPA submitted a draft of this interim final rule to the United States Department of Agriculture (USDA) and to the appropriate Congressional Committees.

USDA responded without comments. The FIFRA Scientific Advisory Panel (SAP) waived review of this interim final rule, concluding that the interim final rule does not contain issues that warrant scientific review by the SAP.

## **VI. Statutory and Executive Order Reviews**

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) and was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been reflected in the docket for this action.

*B. Paperwork Reduction Act (PRA)*

This action does not impose any new information collection activities or burden subject to OMB review and approval under the PRA, 44 U.S.C. 3501 *et seq.* Burden is defined in 5 CFR 1320.3(b). OMB has previously approved the information collection activities contained in the existing regulations and associated burden under OMB Control Numbers 2070-0029 (EPA ICR

No. 0155) and 2070-0196 (EPA ICR No. 2499). An agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the *Federal Register*, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

*C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA, 5 U.S.C. 601 *et seq.* The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements, because the Agency has invoked the APA "good cause" exemption under 5 U.S.C. 553(b). See Unit I.B.2. for additional discussion about the "good cause" finding for this action.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the States, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This interim final rule will not impose substantial direct compliance costs on Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997), as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045, because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This action does not involve technical standards. As such, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14008: Tackling the Climate Crisis at Home and Abroad*

In accordance with Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14008 (86 FR 7619, January 27, 2021), EPA finds that this action will not result in disproportionately high and adverse human health, environmental, climate-related, or other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts during this administrative action to extend the expiration date. This extension will provide EPA and the certifying authorities an opportunity to finalize the revised certification plans, ensuring that the increased protections identified in the 2017 rule are realized



for all affected populations. EPA will continue to work expeditiously with certification authorities to review and approve plans on a rolling basis. This engagement, which was impacted by the COVID-19 pandemic, will ensure the modified plans are appropriately protective of certified pesticide applicators and those under their direct supervision, and will ensure that certified applicators are trained to prevent bystander and worker exposures.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 171**

Environmental protection, Applicator competency, Agricultural worker safety, Certified applicator, Pesticide safety training, Pesticide worker safety, Pesticides and pests, Restricted use pesticides.

Dated: December 14, 2021.

**Michal Freedhoff,**

*Assistant Administrator, Office of Chemical Safety and Pollution Prevention.*

Therefore, for the reasons set forth in the preamble, EPA amends 40 CFR part 171 as follows:

## **PART 171—CERTIFICATION OF PESTICIDE APPLICATORS**

1. The authority citation for part 171 is revised to read as follows:

**Authority:** 7 U.S.C. 136-136y.

### **§ 171.5 [Amended]**

2. Amend § 171.5 by revising paragraph (c) to read as follows:

\* \* \* \* \*

(c) *Extension of an existing plan during EPA review of proposed revisions.* If by March 4, 2020, a certifying authority has submitted to EPA a proposed modification of its certification plan pursuant to subpart D of this part, its certification plan approved by EPA before March 6, 2017 will remain in effect until EPA has approved or rejected the modified plan pursuant to § 171.309(a)(4) or November 4, 2022, whichever is earlier, except as provided in paragraph (d) of this section and § 171.309(b).

\* \* \* \* \*

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